IN RE EVERWOOD TREATMENT COMPANY, INC. AND CARY W. THIGPEN

RCRA (3008) Appeal No. 95-1

FINAL ORDER

Decided September 27, 1996

Syllabus

U.S. EPA Region IV appeals from an Initial Decision assessing a penalty of $59,700 against Everwood Treatment Company and its president Cary W. Thigpen (referred to collectively as "Everwood") for violations of the Resource Conservation and Recovery Act ("RCRA"), as amended, 42 U.S.C. §§ 6901-6992k. The violations alleged in the Region's complaint relate to Everwood's disposal of soil contaminated with a copper, chromate, and arsenic solution in a pit at its wood treatment facility near Mobile, Alabama without first obtaining a permit and without complying with applicable land disposal restrictions. Relying on the 1990 RCRA Penalty Policy ("Penalty Policy"), the Region proposed a penalty of $497,500 (including a 25% upward adjustment for Everwood's alleged willfulness). The State of Alabama has an authorized RCRA program but the Region has exercised its authority under RCRA § 3008, 42 U.S.C. § 6928, to bring its own enforcement action against Everwood.

Under the Penalty Policy, a penalty is assessed by determining the gravity-based penalty for a particular violation from a penalty assessment matrix, adding a multi-day component to account for the duration of the violation, and adjusting the total penalty up or down for case-specific circumstances such as the willfulness of the violation or any good faith efforts to comply. The initial gravity-based penalty, a measurement of the seriousness of the violation, is determined by reference to two factors: potential for harm and the extent of deviation from a statutory or regulatory requirement. The potential for harm factor is made up of the following two subfactors: the risk of exposure of humans or the environment to hazardous waste and the adverse effect of noncompliance on the RCRA program. Either of these subfactors can result in a major potential for harm. Both the potential for harm and the extent of the deviation are characterized on the matrix as either major, moderate, or minor. The Penalty Policy then provides recommended penalty ranges for both the gravity-based penalty and appropriate multi-day penalties.

Following a hearing, the Presiding Officer determined that Everwood was liable for the violations alleged in the complaint. The Presiding Officer concluded, however, that the Region had overestimated the seriousness of the violation. In particular, the Presiding Officer concluded, *inter alia*, that because the Region had failed to establish any actual exposure or environmental harm resulting from the violations, and because the amount of the wastes involved was less than one-half the amount estimated by the Region, the potential for harm from both the permitting and land disposal violations was minor rather than major. In addition, the Presiding Officer rejected the Region's 25% upward adjustment for willfulness. In so doing, the Presiding Officer stated that the Region had ignored Everwood's good faith attempts to comply with the applicable regulations. This appeal followed.

Held: The Presiding Officer's determination that the potential for harm from both the permitting and land disposal violations was minor is reversed. In determining the potential for harm, the Presiding Officer appears to have considered only the risk of exposure of humans or the environment to hazardous waste. He made no mention of the second factor — harm to the RCRA program — as a factor to be considered in determining the potential for harm. Given the nature of the violations in this case, the Board concludes this is reversible error.

Based on the Board's analysis of the statutory criteria and the 1990 RCRA Penalty Policy and because of the importance of the permitting requirements and land disposal restrictions to the RCRA program, the Board concludes that Everwood's failure to obtain a permit before disposing of hazardous waste or to comply with applicable land disposal restrictions are violations of major significance. For these violations the Board assesses a penalty of $199,000 and $20,000 respectively for a total gravity-based penalty of $219,000. Because the Board also agrees with the Region that Everwood's noncompliance was willful, the Board adjusts the gravity-based penalty upward by 25% (or $54,750), for a total penalty of $273,750.

Before Environmental Appeals Judges Ronald L. McCallum, Edward E. Reich and Kathie A. Stein.

Opinion of the Board by Judge McCallum:

Before us is an appeal of an Initial Decision issued by the presiding administrative law judge ("Presiding Officer") in an administrative enforcement action brought by U.S. EPA Region IV against Everwood Treatment Company, Inc. and its president Cary W. Thigpen (hereinafter referred to collectively as "Everwood") for violations of the Resource Conservation and Recovery Act of 1976 ("RCRA"), as amended, 42 U.S.C. §§ 6901-6992k. The alleged violations occurred at Everwood's wood treating facility near Mobile, Alabama. The State of Alabama has its own RCRA program and has been authorized pursuant to RCRA § 3006(b), 43 U.S.C. § 6926(b), to carry out such program in lieu of the Federal program.[1] Nevertheless, in this case the Region exercised its authority under RCRA § 3008, 42 U.S.C. § 6928, to bring its own enforcement action against Everwood for violation of Alabama's RCRA regulations. The violations charged in the complaint concern the alleged disposal of soil contaminated with a copper, chromate, and arsenic solution in a pit at the facility without obtaining a RCRA permit and without complying with applicable land disposal restrictions. The Region sought a penalty for these violations of $497,500. Following an evidentiary hearing conducted from September 7, 1993, through September 15, 1993, the Presiding Officer issued an Initial Decision finding Everwood liable for the violations alleged in the complaint and assessing a penalty of $59,700. The Initial Decision also affirmed the Region's proposed compliance order. Initial Decision at 82. Region IV has appealed the Presiding Officer's

[1] *See infra* note 5.

penalty determination.[2] Everwood has not filed an appeal. For the following reasons, we vacate the Presiding Officer's penalty determination and assess a penalty of $273,750.

I. *BACKGROUND*

As part of its wood treatment process Everwood uses a copper, chromate, and arsenic ("CCA") solution purchased from Chemical Specialty, Inc. ("CSI") of Charlotte, N.C. Everwood's process generates hazardous waste containing arsenic and chromium (both characteristic hazardous wastes as defined in Ala. Admin. Code r. 335-14-2-.032 and 40 C.F.R. § 261.24).[3] This waste is generally placed in drums (also ordered from CSI) and shipped off-site to a permitted disposal facility.

In August 1990, the Alabama Department of Environmental Management ("ADEM") received an anonymous telephone call from an individual identifying himself as a former Everwood employee informing ADEM that CCA solution had recently been spilled at Everwood's wood treatment facility and that Everwood had improperly buried the contaminated soil and debris in a pit on the property. Hearing Transcript ("Tr.") at 296 (N. Thomas). In particular, the informant indicated that the spill had resulted from a broken pipe connecting two tanks and that the contaminated material had been buried in the southwest corner of the facility. In response, ADEM conducted a preliminary compliance inspection on September 21, 1990, and determined that the complaint had been sufficiently substantiated to warrant further investigation. At the preliminary inspection, ADEM inspectors observed that a new pipe had recently been installed connecting the two tanks and that the area where the spill had allegedly occurred looked as if material had been excavated. In addition, an area in the southwest corner of the facility where the informant had indicated the waste had been buried appeared to be covered with fresh clay. *See* Memorandum to File from Eddie Wolfe, Mobile Branch, ADEM (October 1, 1990) (Plaintiff's Exh. 4).

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[2] In its notice of appeal, the Region has also suggested that the compliance order be "clarified" in certain respects. *See* Notice of Appeal at 9-10. In its brief in support of its appeal, however, the Region provides no support for its proposed clarifications. In fact, the Region appears to have dropped the issue entirely. Thus, except to affirm the Region's proposed compliance order, we do not address the compliance order in today's decision.

[3] On October 6, 1986, Cary Thigpen filed a Notification of Hazardous Waste Activity with the Alabama Department of Environmental Management listing Everwood as a small quantity generator of characteristic hazardous wastes D004 (arsenic) and D007 (chromium). Plaintiff's Exh. 1; Initial Decision at 5.

On February 13, 1991, Region IV and ADEM, accompanied by a contractor with a backhoe who was employed by the Region, conducted a joint inspection. As part of this inspection, the Region attempted to locate the waste by excavating the southwest corner of the facility where the informant had indicated the material was buried. After several attempts[4] the Region located a 7000-pound steel cylinder door approximately six inches to one foot below the surface. Initial Decision at 12, 17-18. Dixie L. Beatty, an environmental scientist with ADEM, stated that before the cylinder door was opened she observed a greenish-yellow liquid on the ground. Tr. at 402 (Beatty). Beatty further stated that the facility was located in a marshy, low-lying area with a high water table making the potential for groundwater contamination very high. Tr. at 389, 522. Once the door was uncovered, it was lifted on one side by means of a chain attached to the backhoe revealing a pit containing the contaminated soil. Tests conducted on the soil revealed the presence of arsenic and chromium in amounts exceeding the regulatory limits. *See* Initial Decision at 19. There were no signs posted or any other indications that hazardous wastes had been buried at the site. Tr. at 85 (Thigpen). The pit had been lined and covered loosely with plastic; lime had been added to the contaminated soil. Initial Decision at 11-12. John Trudell, an employee with the Region IV Environmental Services Division, who was also present during the inspection and excavation, observed that the plastic on top of the pit was not sealed and there was liquid pooled on and around it. Tr. at 811-12. It is undisputed that Everwood did not obtain a permit before burying the waste or at any time since.

On June 16, 1992, the Region filed a thirteen-count Complaint and Compliance Order seeking a penalty of $497,500. The complaint charged Everwood with the following violations: 1) operating a hazardous waste disposal facility without a permit in violation of Ala. Code § 22-30-12(b) (1975); 2) failure to obtain a waste analysis of the hazardous waste prior to disposal in violation of Ala. Admin. Code r. 335-14-5-.02(4); 3) failure to properly inspect the facility or to develop and implement a written inspection schedule in violation of Ala. Admin. Code r. 335-14-5-.02(6); 4) failure to establish and maintain an operating record in violation of Ala. Admin. Code r. 335-14-5-.05(4); 5) failure to comply with groundwater monitoring requirements in violation of Ala. Admin. Code r. 335-14-6-.06; 6) failure to maintain a closure and post-closure plan in violation of Ala. Admin. Code r. 335-14-5-.07(3) and (9); 7) failure to establish a

[4] It took the inspectors approximately two hours to find the exact location of the burial area. Hearing Transcript ("Tr.") at 719.

cost estimate for closure in violation of Ala. Admin. Code r. 335-14-5-.08(3); 8) failure to establish financial assurance for closure in violation of Ala. Admin. Code r. 335-14-5-.08(4); 9) failure to establish a post-closure cost estimate in violation of Ala. Admin. Code r. 335-14-5-.08(5); 10) failure to establish financial assurance for post-closure in violation of Ala. Admin. Code r. 335-14-5-.08(6); 11) failure to maintain liability insurance in violation of Ala. Admin. Code r. 335-14-5-.08(8); 12) failure to comply with landfill design and operating requirements in violation of Ala. Admin. Code r. 335-14-5-.14; and 13) failure to comply with land disposal restrictions promulgated under the Hazardous and Solid Waste Amendments to RCRA in violation of 40 C.F.R. §§ 268.35(f) and 268.5(h)(2).[5] In determining an appropriate penalty amount, the Region only considered and sought penalties for the violations alleged in counts 1 and 13 of the complaint thereby exercising its discretion to forgo seeking penalties for counts 2 through 12.[6]

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[5] The State of Alabama is authorized to administer its hazardous waste program in lieu of EPA (55 Fed Reg. 46,466 (Dec. 8, 1987)). At the time the violations occurred and the complaint was issued in this case, however, Alabama was not yet authorized to administer the requirements of the 1984 Hazardous and Solid Waste Amendments ("HSWA") to RCRA. Thus, the Agency carried out the requirements imposed under HSWA directly, including land disposal restrictions found in 40 C.F.R. Part 268. *See* RCRA § 3006(g), 42 U.S.C. § 6926(g)

Although the Agency's land disposal restrictions affecting characteristic hazardous wastes such as those at issue in this case became effective in May of 1990 (55 Fed. Reg. 22,520 (June 1, 1990)), the Agency granted the regulated community "a three-month national capacity variance [from May 8, 1990 to August 8, 1990] based on the time required for the regulated community to make adjustments necessary to comply with the new regulations." 55 Fed. Reg at 22,529; 40 C.F.R. § 268.35(f). The burial in this case took place within this variance period. Although D004 and D007 waste could be land disposed during this period, the receiving landfill or surface impoundment was required to meet the minimum technological requirements set forth at 40 C.F.R. § 268.5(h)(2). These requirements include a groundwater monitoring system, a double liner, and a leachate collection system. *Id.*; Initial Decision at 75. The pit in which the waste was buried met none of the minimum technological requirements.

[6] In its justification for the penalty calculation, the Region stated:

> The RCRA Civil Penalty Policy states that in a case where multiple violations result from a single initial transgression, assessment of a separate penalty for each distinguishable violation may result in a total penalty which is disproportionately high. In Respondents' case, the act of disposing the hazardous waste at the facility without a permit consequently led to all the other violations. EPA has exercised its discretion to forgo separate penalties for each distinguishable violation since the total penalty is appropriate considering the gravity of offense and is sufficient to deter similar future behavior.

Appendix I to Complaint at 4 (Justification for Penalty Calculation).

In calculating the proposed penalty, the Region relied on the 1990 Revised RCRA Civil Penalty Policy ("Penalty Policy"), a document prepared to:

> [E]nsure that RCRA civil penalties are assessed in a fair and consistent manner; that penalties are appropriate for the gravity of the violation committed; that economic incentives for non-compliance with RCRA requirements are eliminated; that penalties are sufficient to deter persons from committing RCRA violations; and that compliance is expeditiously achieved and maintained.

Penalty Policy at 5. The policy implements the requirement in RCRA that in assessing a civil penalty the Agency take into account "the seriousness of the violation, and any good faith efforts to comply with the applicable requirements." RCRA § 3008(a)(3), 42 U.S.C. § 6928(a)(3); Penalty Policy at 4. Under this policy, the penalty is assessed by determining the gravity-based penalty for a particular violation from a penalty assessment matrix (shown below), adding a multi-day component to account for the duration of the violation, and adjusting the total penalty up or down for case-specific circumstances such as the willfulness of the violation or any good faith efforts to comply.[7] Penalty Policy at 1. The initial gravity-based penalty, a measurement of the seriousness of the violation, is determined by reference to two factors: potential for harm (vertical axis) and the extent of deviation from a statutory or regulatory requirement (horizontal axis). *Id.* at 12. The potential for harm factor is made up of the following two subfactors (not shown on the matrix): the risk of exposure of humans or the environment to hazardous waste and the adverse effect of noncompliance on the RCRA program. *Id.* at 13.[8] Both the potential for harm and the extent of the deviation are characterized on the matrix as either major, moderate,

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[7] In appropriate circumstances, the amount may also be increased to account for the economic benefit gained through non-compliance. In the present case, however, the Region has stated that Everwood has not realized any economic benefit. Appendix 1 to Complaint at 4 (Justification for Penalty Calculation).

[8] In this regard, the Penalty Policy states that even violations that do not cause any actual impact on the environment such as record keeping violations may nevertheless "create a risk of harm to the environment or human health by jeopardizing the integrity of the RCRA regulatory program." Penalty Policy at 13. Thus, the policy recognizes that violations undermining the RCRA program can indirectly create a potential for harm to humans or the environment. *See infra* note 24 and accompanying text.

or minor.[9] *Id.* at 15-17. The Penalty Policy then provides recommended penalty ranges in cells on the matrix as follows:

Extent of Deviation from Requirements

Potential for Harm	MAJOR	MODERATE	MINOR
MAJOR	$25,000 to 20,000	$19,999 to 15,000	$14,999 to 11,000
MODERATE	$10,999 to 8,000	$7,999 to 5,000	$4,999 to 3,000
MINOR	$2,999 to 1,500	$1,499 to 500	$499 to 100

Id. at 19.

[9] The Penalty Policy defines the major, moderate, and minor categories as follows:

POTENTIAL FOR HARM

MAJOR (1) the violation poses or may pose a substantial risk of exposure of humans or other environmental receptors to hazardous waste or constituents; and/or

(2) the actions have or may have a substantial adverse effect on statutory or regulatory purposes or procedures for implementing the RCRA program.

MODERATE (1) the violation poses or may pose a significant risk of exposure of humans or other environmental receptors to hazardous waste or constituents; and/or

(2) the actions have or may have a significant adverse effect on statutory or regulatory purposes or procedures for implementing the RCRA program.

MINOR (1) the violation poses or may pose a relatively low risk of exposure of humans or other environmental receptors to hazardous waste or constituents; and/or

(2) the actions have or may have a small adverse effect on statutory or regulatory purposes or procedures for implementing the RCRA program.

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Where the violation is a continuing one, the Penalty Policy provides for the calculation of an additional multi-day penalty on a separate multi-day matrix when use of multi-day penalties is deemed appropriate.[10] A dollar amount is selected from the following multi-day matrix and multiplied by the number of days the violation continued:

Extent of Deviation from Requirements

Potential for Harm	MAJOR	MODERATE	MINOR
MAJOR	$5,000 to 1,000	$4,000 to 750	$3,000 to 550
MODERATE	$2,200 to 400	$1,600 to 250	$1,000 to 150
MINOR	$600 to 100	$300 to 100	$100

EXTENT OF DEVIATION

MAJOR: the violator deviates from requirements of the regulation or statute to such an extent that most (or important aspects) of the requirements are not met resulting in substantial noncompliance.

MODERATE: the violator significantly deviates from the requirements of the regulation or statute but some of the requirements are implemented as intended.

MINOR: the violator deviates somewhat from the requirements but most (or all important aspects) of the requirements are met.

Penalty Policy at 15-17.

[10] Such multi-day penalties are considered either mandatory, presumed, or discretionary as follows:

Mandatory multi-day penalties: multi-day penalties are mandatory for days 2-180 of all violations with the following gravity-based designations: major-major, major-moderate, moderate-major. The *only* exception is when they have been waived, in "highly unusual cases" with prior Headquarters

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Penalty Policy at 24. The penalty amount may then be adjusted upwards or downwards based on the application of the previously-mentioned adjustment factors. Penalty Policy at 32-40.

In the present case, the Region determined that, with regard to the permitting violations, both the potential for harm and the extent of the deviation should be considered major.[11] Using the above two matrices the Region proposed a gravity-based penalty of $25,000 and added a multi-day penalty of $2,000 per day. Appendix I to Complaint at 1-4 (Justification for Penalty Calculation). The Region then multiplied the multi-day penalty ($2,000) by 179 (the number of days the

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> (HQ) consultation * * *. Multi-day penalties for days 181+ are discretionary.
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> *Presumption in favor of multi-day penalties*: Multi-day penalties are presumed appropriate for days 2-180 of violations with the following gravity-based designations: major-minor, moderate-moderate, minor-major. * * *
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> *Discretionary multi-day penalties*: Multi-day penalties are discretionary, generally, for all days of violation with the following gravity-based designations: moderate-minor, minor-moderate, minor-minor.

Penalty Policy at 23 (emphasis in original).

[11] With regard to the potential for harm, the Region stated, in part:

> RCRA § 3005(a) prohibits the disposal of hazardous waste without a permit. The permit is the primary mechanism used to ensure the proper cradle-to-grave management of hazardous wastes to protect human health and the environment. Without permit mechanisms in place to prevent and detect any release to the environment, the risk of exposure to potential receptors (i.e., facility workers, nearby residents, drinking water sources, ecological populations, etc.) is quite substantial. And given the proximity of the buried hazardous waste to the water table, and the presence of domestic wells in the vicinity, actual harm is already evident by Respondents' violations.

Appendix I to Complaint at 2-3 (Justification for Penalty Calculation).

With regard to the extent of the deviation, the Region stated:

> Respondents failed to submit a RCRA permit application, disposed of hazardous waste at the facility without a permit, and failed to meet the referenced 40 CFR Part 264 and 265 statutory or regulatory provisions, which represents a major deviation from the requirements.

Id. at 3.

violation continued)[12] for a total of $358,000. Finally, the Region adjusted this total upward by 25% (or $89,500) for Everwood's alleged willfulness.[13] *Id.* at 1, 3-4. Thus, for the violations in Count 1 of the complaint, the Region sought a penalty of $472,500 ($25,000 + $358,000 + $89,500). With regard to Count 13[14] of the complaint relating to land disposal restrictions, the Region again classified both the potential for harm and the extent of deviation as major and proposed a penalty of $25,000. Thus, the Region proposed a total penalty of $497,500 ($472,500 + $25,000).

At the hearing, Cary Thigpen testified that a spill did indeed occur in June of 1990. Upon learning of the spill he instructed the foreman at the facility, Wayne Cruit, to lime the area and place the contaminated soil on the drip pad.[15] Tr. at 62. Thigpen then purchased a roll of polyvinyl plastic at a nearby hardware store and instructed his employees to dig a hole behind a storage building, line it with plastic, and bury the contaminated soil in the hole. As stated earlier, the hole was then covered by an old cylinder door; the door was then covered with dirt. According to Mr. Thigpen, he ordered the wastes buried because at the time he had no drums available in which to load the material for disposal offsite. *Id.* at 77, 88. He further stated that at the time of the burial he did not intend to dispose of the wastes but to store them temporarily pending completion of a planned new facility. *Id.* at 92. Neither Thigpen nor any Everwood employee informed ADEM or EPA of the spill or the burial of the waste prior to the anonymous call by a former employee to ADEM.

In his Initial Decision, the Presiding Officer found Everwood liable for the violations alleged in the complaint.[16] He disagreed, how-

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[12] In its proposed penalty calculation, the Region stated that "[a]lthough the violations continued past 180 days, the multi-day penalty was calculated using only 179 days to prevent the penalty from being exorbitantly high." Appendix I to Complaint at 2 (Justification for Penalty Calculation).

[13] Apparently, the Region only applied the 25% upward adjustment to the multi-day component of the penalty. As the penalty policy makes clear, however, any such adjustment should have been applied to the sum of the gravity-based penalty and any multi-day penalties. Penalty Policy at 1.

[14] Consistent with the Penalty Policy, the Region did not seek a separate penalty for violations alleged in counts 2 through 12 of the complaint. *See* Initial Decision at 81 n.50.

[15] The drip pad is a large concrete slab upon which lumber is placed after it has undergone treatment. Drippings drain into a sump where the chemicals are collected for reuse. *See* 40 C.F.R. § 260.10 (definition of "drip pad").

[16] In finding against Everwood on liability, the Presiding Officer rejected the two primary defenses Everwood proffered at the hearing. Specifically, the Presiding Officer rejected Ever-

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ever, with the Region's proposed penalty calculation. In particular, while he agreed that the extent of the deviation for both the permitting and land disposal violations were "major,"[17] the Presiding Officer concluded that the potential for harm from the violations should be considered "minor."[18,19] Initial Decision at 78. In addition, the Presiding Officer rejected the Region's proposed 25% upward adjustment for willfulness. *Id.* at 79

Using the above-cited penalty matrices, the Presiding Officer assessed a gravity-based penalty of $3,000 for the initial permitting violation. He then assessed an additional penalty of $300 for each of the 179 days the violation continued for a total multi-day penalty of $53,700. With regard to the land disposal violations, the Presiding Officer assessed an additional penalty of $3,000 for a total penalty of $59,700 ($53,700 + $3,000 + $3,000). In explaining his reduction of the proposed penalty, the Presiding Officer stated:

> [T]he seriousness of the violation has been vastly overstated and that no consideration has been given to Respondents' "good faith attempts to comply with applicable requirements." [RCRA § 3008(a)(3)]. It follows that the penalty proposed is not in compliance with the statute and is grossly excessive. It also follows

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wood's assertion that no RCRA permit was required because Everwood's actions in cleaning up the spill and burying the contaminated soil were part of an emergency response under the Comprehensive Environmental Response, Compensation, and Liability Act ("CERCLA"). Initial Decision at 55 (holding that "even if Everwood's actions in response to the spill were removal actions under CERCLA, RCRA, corresponding provisions of the Alabama Hazardous Waste Management and Minimization Act and regulations thereunder are requirements applicable to Everwood under the circumstances present here."). The Presiding Officer also rejected Everwood's assertion that the burial of the contaminated waste did not constitute "disposal" because Everwood intended to remove the material upon completion of a new facility. Initial Decision at 74 (holding that "Everwood's claimed intention to remove the waste from the containment unit when the [facility] was closed is too indefinite to relieve Respondents of the obligation to obtain a permit."). As stated above, Everwood has not appealed from either the liability or penalty portion of the Initial Decision.

[17] *See supra* note 9.

[18] *Id.*

[19] His reasons for this finding were as follows: 1) whereas the Region estimated the total volume of contaminated soil at 9 cubic yards, the Presiding Officer concluded that the actual amount was approximately 3.66 cubic yards (*see* Initial Decision at 7-10, 77-78); 2) the Region failed to establish any actual impact from the disposal (*id.* at 78); and 3) Everwood took measures to avoid impact on the environment such as lining the burial pit with a double layer of polyvinyl plastic sheeting and capping the pit with a steel door (*id.*).

> that the proposed penalty is punitive rather than deterrent and remedial.

Initial Decision at 79-80.

On appeal, the Region contests the Presiding Officer's penalty determination. The Region argues that the Presiding Officer did not adequately consider the RCRA Civil Penalty Guidelines, and that the resulting penalty undermines the RCRA permitting requirements by trivializing "serious violations going to the heart of the RCRA regulatory scheme." Brief in Support of Complainant's Appeal of Initial Decision ("Appeal") at 3. As part of its objection, the Region also challenges several of the Presiding Officer's factual findings and legal conclusions leading to the penalty. Among other things, the Region challenges the Presiding Officer's finding that there was no actual impact from the violations or that given the nature and seriousness of the violation the risk of exposure was minor. *See* Appeal at 17-26. The Region also challenges the Presiding Officer's rejection of the proposed 25% increase in the penalty for willfulness and his conclusion that Everwood's actions reflected any "good faith" attempts to comply with the RCRA permitting requirements or the applicable land disposal restrictions. *See id.* at 40-43. In response, Everwood contends that the $59,700 total penalty was well within the Presiding Officer's discretion, and was supported by the evidence adduced at the evidentiary hearing.[20]

II. *DISCUSSION*

Under the regulations governing a civil penalty proceeding, the Presiding Officer is obliged to consider any civil penalty policies issued by the Agency. 40 C.F.R. § 22.27(b). In any particular instance, however, the Presiding Officer may depart from the policy as long as he or she considers it and adequately explains the reasons for departing from it. *In re DIC Americas, Inc.*, 6 E.A.D. 184, 190 and n.10 (EAB 1995); *In re A.Y. McDonald Industries, Inc.*, 2 E.A.D. 402, 414 (CJO 1987). In reviewing a Presiding Officer's penalty determination, the

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[20] In its reply to the Region's appeal, Everwood has raised certain issues outside the scope of the appeal. These are: 1) whether the penalty assessed by the Presiding Officer should be waived or modified (Brief of Respondents, Everwood Treatment Company, Inc. and Cary W. Thigpen ("Everwood Brief") at 31-33); 2) whether the RCRA Civil Penalty Policy is unconstitutional (Everwood Brief at 28-30); and 3) whether the term "immediate response" as used in 40 C.F.R. § 264.1(g)(8) is unconstitutional (Everwood Brief at 4). As Everwood did not file an appeal, however, it failed to secure its right to review on these issues. 40 C.F.R. § 22.30(a)(2) ("Reply briefs shall be limited to the scope of the appeal."); *In re General Electric Company*, 4 E.A.D. 884, 909 n.32 (Nov. 1, 1993), *rev'd on other grounds*, 53 F.3d 1324 (D.C. Cir. 1995).

applicable regulation confers discretion on the Board to increase or decrease such a civil penalty. 40 C.F.R. § 22.31(a) ("The Environmental Appeals Board may, in its discretion, increase or decrease the assessed penalty from the amount recommended to be assessed in the decision or order being reviewed * * *.").

In the present case, the Presiding Officer considered the RCRA Penalty Policy but determined that, in his words, it would not be "strictly followed." Initial Decision at 78. In particular, the Presiding Officer concluded, among other things, that because the Region had not established any actual environmental impact from the permitting violation, and because the quantity of the contaminated material was relatively small "and less than one-half the volume assumed in calculating the penalty sought by [the Region],"[21] the potential for harm resulting from both the permitting and land disposal violations was minor rather than major. *Id.* For the following reasons, we reverse the Presiding Officer's determination in this regard and conclude that the potential for harm from both violations must be considered major. We assess a penalty of $199,000 for the permitting violation and $20,000 for the land disposal violation for a total gravity-based penalty of $219,000. In addition, we agree with the Region that the penalty should be adjusted upward by 25% (or $54,750) based on Everwood's willfulness. Thus, we assess a total penalty of $273,750 ($199,000 + $20,000 + $54,750).

A. Permitting Violation

In determining an appropriate civil penalty, the Agency must take the seriousness of the violation into account, as well as any good faith efforts to comply with the applicable requirements. RCRA § 3008(a)(3), 42 U.S.C. § 6928(a)(3) ("[T]he Administrator shall take into account the seriousness of the violation and any good faith efforts to comply with applicable requirements."). In so doing, this Board (and the Chief Judicial Officer ("CJO") before it) have looked to the Agency's RCRA Civil Penalty Policy as an analytical model for determining an appropriate penalty. *See In re Gordon Redd Lumber Company*, 5 E.A.D. 301, 331 (EAB, June 9, 1994); *A.Y. McDonald Industries, Inc.*, 2 E.A.D. 402 at 412-15. Under the 1990 Penalty Policy the potential for harm in calculating a gravity-based penalty is determined by reference to two factors: 1) the risk of exposure of humans or the environment to hazardous waste, and/or 2) the adverse effect that non-compliance may have "on the statutory or regulatory purposes or procedures for implementing the RCRA program." Penalty Policy at 15. Either one of these

[21] *See infra* note 28 and accompanying text.

factors can result in a "major" potential for harm for purposes of determining an appropriate gravity-based penalty amount. *Id.*[22] In his Initial Decision, the Presiding Officer appears to have considered only the first factor. That is, he considered only factors going to the risk of exposure such as evidence of a release, measures taken by the respondent to prevent a release, and the quantity of the wastes released. Initial Decision at 77-79; Penalty Policy at 13-14. The Presiding Officer's conclusion that the potential for harm was minor was based on his findings that there was no actual impact from the violations, that the quantity of the wastes was less than that estimated by the Region, and that given Everwood's actions in lining the burial pit with plastic and covering it with a steel door, the risk of exposure was minimal. Initial Decision at 78. The Presiding Officer made no mention of the second factor — specifically, in the context of this case, harm to the RCRA permitting scheme — as a factor to be considered in determining the potential for harm. Given the nature of the violation in this case, we believe this to be reversible error.

As the CJO stated in *In re A.Y. McDonald Industries, Inc.*, the RCRA permitting requirements "go to the very heart of the RCRA program. If they are disregarded, intentionally or inadvertently, the program cannot function." *A.Y. McDonald*, 2 E.A.D. at 418. In *A.Y. McDonald*, the CJO rejected a Presiding Officer's determination that the failure to obtain a permit before disposing of hazardous waste on the ground resulted in a "moderate" potential for harm. Rather, the CJO concluded that because of the adverse effect on the RCRA program the potential for harm should be considered "major" even where there is no evidence of actual harm.[23] *Id.* at 419; *see also In re Port of Oakland and Great Lakes Dredge and Dock Co.*, 4 E.A.D. 170, 186 (EAB, Aug. 5, 1992) (applying the CJO's reasoning in *A.Y. McDonald* to unpermitted ocean dumping in violation of the Marine Protection, Research, and Sanctuaries Act and stating that such dumping should be considered of "major" significance). The CJO cited with approval the following statement in the 1984 RCRA Civil Penalty Policy:

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[22] The penalty policy states that a major potential for harm exists where "(1) the violation poses or may pose a substantial risk of exposure of humans or other environmental receptors to hazardous waste or constituents; *and/or* (2) the actions have or may have a substantial adverse effect on the statutory or regulatory purposes or procedures for implementing the RCRA program." Penalty Policy at 15 (emphasis added).

[23] The Region disputes the Presiding Officer's determination that there is no evidence of actual harm in the present case. However, because we conclude that the potential for harm should be considered "major" regardless of whether the record contains evidence of actual harm, we do not reach this issue in today's order

> There may be violations where the likelihood of exposure resulting from the violation is small, difficult to quantify, or nonexistent, but which nevertheless may disrupt the RCRA program (*e.g.*, failure to comply with financial requirements). This disruption may also present a potential for harm to human health or the environment, due to the adverse effect noncompliance can have on the statutory or regulatory purposes or procedures for implementing the RCRA program.

Id. at 420 (*quoting* 1984 RCRA Civil Penalty Policy at 6). The policy applicable to this case, the 1990 Penalty Policy, also supports the conclusion that certain violations may have "serious implications" for the RCRA program and can have a "major" potential for harm regardless of their actual impact on humans and the environment. Penalty Policy at 14. The Penalty Policy lists operating without a permit as one example of this kind of regulatory harm. *Id.* at 14-15.[24]

In the present case, the Presiding Officer concluded that "Everwood's actions in placing the contaminated material in a lined excavation at its plant prima facie constituted 'disposal' of hazardous waste," and that its burial and holding of the material in the burial pit constituted operation of a disposal facility. Initial Decision at 45. It is

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[24] The following example of a "financial assurance" violation in the 1990 Penalty Policy illustrates that there need not be any actual harm to human health or the environment in order for a violation to have "major" potential for harm and, therefore, to be of major significance:

> 40 CFR §265.143 requires that owners or operators of hazardous waste facilities establish financial assurance to ensure that funds will be available for proper closure of facilities. Under §265.143(a)(2), the wording of a trust agreement establishing financial assurance for closure must be identical to the wording specified in 40 CFR §264.151(a)(1). Failure to word the trust agreement as required may appear inconsequential. However, even a slight alteration of the language could change the legal effect of the financial instrument so that it would no longer satisfy the intent of the regulation thereby preventing the funds from being available for closure. Such a facility could potentially become another hazardous waste site. When the language of the agreement differs from the requirement such that funds would not be available to close the facility properly, the lack of identical wording would have a substantial adverse effect on the regulatory scheme (and, to the extent the closure process is adversely affected, could pose a substantial risk of exposure). This violation would therefore be assigned to the *major* potential for harm category.

Penalty Policy at 16.

undisputed that Everwood failed to obtain a permit for these activities as required by both Alabama and federal regulations. Through this unpermitted burial of hazardous waste in a concealed location at the facility,[25] Everwood engaged in precisely the type of activity that RCRA was enacted to prevent. Nevertheless, the Presiding Officer concluded that "the seriousness of the violation has been vastly overstated." Initial Decision at 79. We disagree.

An analysis of the 1990 Penalty Policy clearly indicates that violations of regulatory requirements which are fundamental to the RCRA program such as the permitting requirement at issue in this case "merit substantial penalties" in that they "undermine[] the statutory or regulatory purposes or procedures for implementing the RCRA program." Penalty Policy at 14; *see also id.* at 48-49 (Hypothetical Application of the Penalty Policy, Example 1) (stating that the potential for harm in operating without a permit is major in that it "may pose a substantial risk of exposure, and may have a substantial adverse effect on the statutory purposes for implementing the RCRA program."). Such violations go to the heart of the RCRA program. Thus, based on our analysis of the statutory criteria (in particular, the "seriousness of the violation") as well as the penalty policy, and to deter any future unpermitted disposal,[26] we conclude that the failure to obtain a permit prior to disposing of hazardous waste under the facts of this case must be considered a violation of major significance.[27] *See U.S. EPA v. Environmental Waste Control,* 710 F. Supp. 1172, 1244-45 (N.D. Ind. 1989) (imposing a penalty of $2,778,000 for various RCRA violations including the disposal of hazardous waste without a permit), *aff'd,* 917 F.2d 327 (7th Cir. 1990). Thus, we find no basis for the Presiding Officer's classification of the violation as presenting only a minor potential for harm. Accordingly, for the above-stated reasons, we conclude that the violations in this case must be considered major for purposes of determining an appropriate penalty.

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[25] The hazardous waste was buried in the southwest corner of the facility and was covered with dirt. Photos of the area show that the burial pit was not visible to the naked eye and it is undisputed that Everwood did not place signs or provide any other indication that hazardous waste had been buried in the area. *See* Complainant's Exhs. 11B and 49.

[26] *See* Penalty Policy at 5 (penalties must be sufficient to deter persons from committing RCRA violations).

[27] The permitting requirement is fundamental: RCRA § 3005(a), 42 U.S.C. § 6925(a), states that after the effective date of the applicable regulations "the treatment, storage, or disposal of any [identified or listed] hazardous waste * * * is prohibited except in accordance with a permit." RCRA § 3008(d)(2)(A), 42 U.S.C. 6928(d)(2)(A), provides that any person who knowingly treats, stores, or disposes of hazardous waste without a permit may be subject to criminal prosecution.

Penalty Range

The Presiding Officer concluded, and we agree, that the extent of the deviation from the RCRA regulatory requirements was major and, as previously stated, Everwood has not challenged this conclusion on appeal. *See A.Y. McDonald*, 2 E.A.D. at 420 (stating that the total failure to adhere to the permitting requirements "can be described as nothing other than a major deviation"). Where, as here, both the potential for harm and the extent of the deviation are major the penalty assessment matrix recommends a penalty range of $20,000 to $25,000. Penalty Policy at 19. Given the relatively small quantity of waste involved in this case,[28] we believe that a gravity-based penalty of $20,000 is appropriate. With regard to a multi-day penalty, the penalty matrix recommends a penalty range of $1,000 to $5,000. Penalty Policy at 24. As with the gravity-based penalty, because of the small quantity of the wastes involved, we believe that penalty at the bottom of this range ($1,000) is appropriate. When multiplied by the number of days the violation continued (179), the total multi-day penalty is $179,000. This yields a gravity-based penalty of $199,000 ($179,000 + $20,000) for the permitting violation.

B. Land Disposal Violation

In its proposed penalty calculation the Region argued that both the potential for harm and the extent of the deviation from the regulatory or statutory requirements from the land disposal requirements were major. The Region proposed a penalty of $25,000 for these violations. Although the Presiding Officer agreed that the violations should be considered a major deviation from the applicable requirements, he concluded that the potential for harm was minor and he assessed a penalty of $3,000. In justifying his determination that the Region erred in characterizing the potential for harm as major, the Presiding Officer stated only that the "[r]isks from this violation do not differ from the risks from operating the unit without a permit and the

[28] The Presiding Officer estimated the volume of the contaminated soil at issue in this case at between three and four cubic yards. Initial Decision at 7-8, 9-11, 77. The Region has disputed this conclusion on appeal. According to the Region, the volume of the contaminated soil was approximately nine to ten cubic yards. Appeal at 7, 24. Because there is sufficient evidence in the record on appeal to support the Presiding Officer's conclusion in this regard, including the testimony of the Region's own witness (John Trudell, Tr. at 794, 804) who estimated the volume of contaminated soil at 3.66 cubic yards, and because the Presiding Officer had the opportunity to hear and observe the witnesses, we decline to disturb the Presiding Officer's determination on the amount of contaminated soil. *See In re Great Lakes Division of National Steel Corp.*, 5 E.A.D. 355, 372 (EAB, June 29, 1994) (stating that the Board "will generally give considerable deference to a presiding officer's determinations as to the credibility to be afforded the testimony of witnesses at a hearing.").

potential for harm is determined to be minor." Initial Decision at 80. As with the permitting violation, we reverse the Presiding Officer's determination in this regard and conclude that the potential for harm must be considered major.

As the Presiding Officer concluded, and as the record clearly reflects, in simply burying the contaminated soil in a pit at its facility, Everwood completely failed to comply with the regulations governing land disposal of hazardous wastes. As previously stated (*see supra* note 5), under the Agency's land disposal restrictions promulgated on June 1, 1990, hazardous wastes (such as those at issue in this case) which were disposed of on land between May 8 and August 8, 1990, were required to meet minimum technological requirements, including ground water monitoring, the installation of two or more liners, and a leachate collection system. *See* Initial Decision at 75; RCRA § 3004(o); 40 C.F.R. § 268.5(h).[29] The burial pit at Everwood's facility, consisting essentially of a hole in the ground covered with a metal door designed for another purpose, bears no resemblance to the technological characteristics of the units envisioned by these requirements.[30] Even if the Presiding Officer were correct in concluding that no actual environmental damage has resulted from Everwood's action, the failure to install a leachate collection system or a groundwater monitoring system could impair the detection of such damage even if it were to occur. The Penalty Policy makes clear that violations may be considered of major significance based on their *potential* for harm, even where no actual damage has resulted. As with the permitting violation, the complete failure to comply with these requirements presents a major potential for harm in that it "undermines the statutory or regulatory purposes or procedures for implementing the RCRA pro-

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[29] The Agency's land disposal restrictions were put in place under HSWA, and were designed to prohibit land disposal of certain groups of hazardous wastes unless "it has been demonstrated to the Administrator, to a reasonable degree of certainty, that there will be no migration of hazardous constituents from the disposal unit * * * for as long as the wastes remain hazardous." RCRA §§ 3004(d)(1), (g)(5); 42 U.S.C. §§ 6924(d)(1), (g)(5). The restrictions are designed to ensure that hazardous waste will only be land disposed if the wastes involved as well as the disposal unit meet very stringent requirements. *See* RCRA § 3004(m)(1), 42 U.S.C. § 6924(m)(1) (requiring the Agency to "promulgate regulations specifying those methods of treatment, if any, which substantially diminish the toxicity of the waste or substantially reduce the likelihood of migration of hazardous constituents from the waste so that short-term and long-term threats to human health and the environment are minimized.").

[30] Although Everwood placed the waste in two layers of plastic, Everwood does not contend and the record does not reflect that this plastic met the requirement that "two or more liners" be installed in any landfill or surface impoundment. *See* 40 C.F.R. § 268.5(h)(2); RCRA § 3004(o), 42 U.S.C. § 6924(o); Tr. at 1882 (J. Sophianopoulos) ("a much sturdier liner would be required" to meet statutory requirements).

gram." Penalty Policy at 14. In fact, the Penalty Policy specifically lists the failure to install or conduct adequate groundwater monitoring as an example of the type of violation having "serious implications and merit[ing] substantial penalties." *Id.* at 14-15; *see also A.Y. McDonald*, 2 E.A.D. at 421-22 (rejecting the presiding officer's conclusion that the potential for harm from the failure to implement a groundwater monitoring system was "moderate" and stating that "even if the quantity and toxicity of [the] * * * waste were relatively low, the complete failure to implement groundwater monitoring had a substantial adverse effect on the RCRA program and a major potential for harm.").

Thus, based on the seriousness of the violation in this case, *see* RCRA § 3008(a)(3), 42 U.S.C. § 6928(a)(3) (in assessing a civil penalty, the Agency must consider the "seriousness of the violation"), as well as on our analysis of the Penalty Policy, we conclude that Everwood's disposal of hazardous waste without complying with applicable land disposal restrictions is a violation of major significance. Accordingly, as with the permitting violation, we conclude that the land disposal violation must be considered major for purposes of assessing an appropriate penalty.

Penalty Range

As with the permitting violation, we agree with the Presiding Officer that the extent of the deviation from the land disposal requirements was major. *See A.Y. McDonald*, 2 E.A.D. at 422 (it is "self evident" that the failure to implement groundwater monitoring is a major deviation). Where, as here, both the potential for harm and the extent of the deviation are major the penalty assessment matrix recommends a penalty range of $20,000 to $25,000. Penalty Policy at 19. As with the permitting violations, we conclude that given the relatively small quantity of waste involved in this case, a gravity-based penalty of $20,000 is appropriate. Thus, we assess a total gravity-based penalty of $219,000 ($199,000 + $20,000).

C. Good Faith

In reducing the Region's proposed penalty the Presiding Officer relied, in large part, on his conclusion that the Region gave no consideration to Everwood's "good faith attempts to comply with applicable requirements." *See* RCRA § 3008(a)(3), 42 U.S.C. § 6928(a)(3) ("[T]he Administrator shall take into account * * * any good faith efforts to comply with applicable requirements."); Initial Decision at 79-80. The Presiding Officer did not, however, articulate precisely what actions he believed demonstrated Everwood's good faith efforts to

comply with the relevant regulations, nor can we find any compelling evidence of good faith in the record before us.

The only evidence cited by the presiding officer that could arguably be considered "good faith" was Everwood's removal of the contaminated soil from the area of the initial spill,[31] its lining of the disposal pit prior to burying the waste, and its covering of the disposal pit.[32] None of these factors, however, demonstrate any "good faith" efforts to comply with the applicable requirements as that term has been interpreted by the Agency. First, the clean-up of the initial spill is unrelated to the violations alleged in the complaint. That is, the violations at issue in this case concern Everwood's actions in disposing of the waste *after* excavation of the initial spill. Thus, even if Everwood's actions in cleaning up the initial spill were appropriate, it is irrelevant to the question of whether Everwood made any good faith efforts to comply with the permitting or land disposal requirements before burying the contaminated soil.

And second, although it is true that Everwood lined the pit with plastic before burying the waste, and covered the pit with a steel door, there is no evidence that this was intended as an effort to comply with the regulations. That is, Everwood does not assert, and the record does not reflect, that its actions were in any way intended as an effort to comply with the applicable land disposal restrictions or the minimum technological requirements. On the contrary, it was Everwood's assertion at the hearing that because it never intended to "dispose" of the wastes and because its actions were part of an emergency response under CERCLA, Everwood was not subject to any of these requirements.[33] *See* Brief of Respondents, Everwood Treatment Company, Inc., and Cary W. Thigpen at 42-43. Similarly, Everwood argued at the hearing that it was not subject to Alabama or RCRA permitting requirements. *See* Respondent's Proposed Conclusions of Law at 1.

In discussing what actions demonstrate "good faith," the 1990 RCRA penalty policy states, in part:

> The violator can manifest good faith by promptly identifying and reporting noncompliance or instituting

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[31] *See* Initial Decision at 79.

[32] *See* Initial Decision at 78.

[33] The Presiding Officer rejected both of these assertions. *See supra* note 16.

> measures to remedy the violation before the Agency detects the violation.
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> * * * * * * *
>
> No downward adjustment [of the penalty amount] should be made if the good faith efforts to comply primarily consist of coming into compliance. Moreover, no downward adjustment should be made because respondent lacks knowledge concerning either applicable requirements or violations committed by respondent.

Penalty Policy at 33. As stated in *A.Y. McDonald,* significant penalty reductions for good faith "should be reserved for those cases where the violator promptly reports its non-compliance, or the possibility of non-compliance, once discovered or suspected." *A.Y. McDonald*, 2 E.A.D. at 421. Everwood made no attempt to contact ADEM or EPA either when the initial spill occurred or prior to burying the contaminated soil. Further, it buried the material in a concealed location without sufficient safeguards to prevent or detect contamination. But for the anonymous reporting of the violation to ADEM, the waste might still be buried and thereby pose a potential health or environmental hazard. Indeed, as discussed in the following section relating to willfulness, the burial of the waste could be construed as an attempt to hide the waste from further regulatory scrutiny. Thus, based on our review of the record, none of Everwood's actions following the spill can be considered evidence of "good faith" for purposes of reducing the penalty.

D. Willfulness

Under the RCRA Penalty Policy, a penalty may be adjusted upward for willfulness and/or negligence. Penalty Policy at 34-35. In discussing such an adjustment, the Penalty Policy states:

> While "knowing" violations of RCRA will support criminal penalties pursuant to section 3008(d), there may be instances of heightened culpability which do not meet the criteria for criminal action. In cases where civil penalties are sought for actions of this type, the penalty may be adjusted upward for willfulness and/or negligence.

Id. at 34. The Penalty Policy then provides examples of the types of factors that should be considered in determining whether an adjustment is appropriate. These are:

- how much control the violator had over the events constituting the violation;
- the foreseeability of the events constituting the violation;
- whether the violator took reasonable precautions against the events constituting the violation;
- whether the violator knew or should have known of the hazards associated with the conduct; and
- whether the violator knew or should have known the legal requirement which was violated.

Id.

The Region determined that a 25% upward adjustment was appropriate in this case. In rejecting this increase, the Presiding Officer stated:

> Everwood not having drums or other suitable containers in which to store the contaminated material, it has been concluded supra that an immediate response within the meaning of § 264.1(g)(8) was not over until a reasonable time in which to obtain drums or other suitable containers had elapsed. The only evidence in the record in this respect is Mr. Thigpen's testimony that it took two to three weeks to obtain drums from CSI (finding 13). It is concluded that the 25% upward adjustment calculated by Complainant, because Mr. Thigpen did not immediately manifest the contaminated material off site to a licensed TSD facility, has no proper basis.

Initial Decision at 79. As the Region has pointed out, however, the upward adjustment to the penalty was not based on Everwood's failure to "immediately" manifest the waste offsite. Rather, the Region stated:

> Respondent Cary Thigpen had knowledge of the toxicity of CCA * * * [y]et, when a CCA spill occurred at his facility in 1990, he elected to bury the waste onsite in lieu of shipping it offsite to a designated facility. He had direct control over the events that led to the violations, and even directed how the waste was to be buried. Such actions represent a high degree of will-

> fulness, and warrant an upward adjustment of the penalty amount by 25%.

Appendix I to Complaint at 3-4 (Justification for Penalty Calculation). Moreover, as the Presiding Officer himself concluded:

> Mr. Thigpen has acknowledged that he made no attempt to order drums on the day of the spill or immediately thereafter. Moreover, even if Mr. Thigpen's testimony that two to three weeks would be required to obtain drums from CSI is considered to be reasonable as to the time when an "immediate response" within the meaning of § 261.4(g)(8)(iii) would be over, it is clear that the "storage" claimed by Everwood continued long after a reasonable time for obtaining drums had elapsed.

Initial Decision at 65. It does not appear from the record before us that Everwood ever intended to obtain drums and manifest the contaminated soil offsite within a reasonable period of time.

Based on our review of the record, we agree with the Region that Everwood's actions in burying the contaminated soil were willful and therefore justify an upward adjustment in the gravity-based penalty. In particular, the record indicates that despite his awareness of the applicable regulations as well as the toxicity of the CCA solution,[34] Thigpen ordered and actually assisted in burying the contaminated soil.[35] Further, the burial site in this case was located in a corner of the facility under or near a parking lot and was not marked in any way. In fact, during the February 13, 1991 inspection not even Thigpen could recall the exact location of the pit, except that it was in the southwest corner of the facility.[36] Moreover, despite Thigpen's assistance, it took inspectors two hours to locate the steel door.[37]

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[34] Fred Omundson, Vice President of sales for CSI testified at the hearing that CSI regularly provided its customers with updates on environmental regulations. Tr. at 833. We also note that Everwood frequently placed hazardous waste generated from the normal operation of its wood treatment facility in drums ordered from CSI for shipment offsite to a licensed disposal facility.

[35] Tr. at 79 (Thigpen) (stating that he and his employees buried the contaminated soil).

[36] *See RCRA Case Development Investigation/Evaluation, Everwood Treatment, Irvington, Alabama, ESD Project No. 91-277, February 13, 1991*, at 2 (Plaintiff's Exh. 10) (stating that Thigpen told the inspectors that the spill had occurred "and showed [them] the burial location in the southwest corner of the facility in the parking lot.").

[37] Tr. at 719.

These facts cast serious doubt on Everwood's assertion that it intended the burial only as a temporary storage measure pending acquisition of drums and/or completion of a planned new wood treatment facility. On the contrary, under the totality of the circumstances, we believe it is more likely that Everwood buried the wastes in a location where they would never be discovered — which might well still be the case had the burial not been reported by a former employee. This conduct is consistent with being aware of the applicable regulations and choosing to evade them. Thus, based on our review of the record, we agree with the Region that Everwood's actions in burying hazardous waste in a pit at its facility without obtaining a permit and without complying with applicable land disposal requirements were willful and therefore warrant an upward adjustment of the gravity-based penalty. Accordingly, we believe that an upward adjustment of 25% (or $54,750) as proposed by the Region is appropriate. We therefore assess a total penalty of $273,750 ($199,000 + $20,000 + $54,750).[38, 39]

III. *CONCLUSION*

For the reasons set forth above, a civil penalty of $273,750 is assessed jointly and severally against respondents Everwood

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[38] Everwood did not raise its ability to pay the proposed penalty as an issue either at the hearing or in its response to this appeal. In fact, at the hearing Everwood's attorney (John V. Lee) stated that ability to pay was not an issue in this case. Tr. at 1217-18. Thus, we do not address the issue in this Order. *In re New Waterbury, Ltd.*, 5 E.A.D. 529, 542 (Oct. 20, 1994) (where a respondent fails to raise its ability to pay as an issue, the issue may be considered waived under the Agency's procedural rules).

[39] In assessing the penalty, the Presiding Officer stated:

> Having observed Mr. Thigpen on the witness stand and in the court room during the extended hearing on this matter, I have no hesitation in concluding that the [$59,700] penalty assessed herein will be ample deterrent to future violations.

Initial Decision at 80. Although the Board will generally defer to a presiding officer's determinations as to the credibility or demeanor of a witness (*see supra* note 28), the Board is not bound by these determinations. *See* Administrative Procedure Act, 5 U.S.C. § 557(b) ("On appeal from or review of the initial decision, the agency has all the powers which it would have in making the initial decision * * *."); *W.F. Bolin Company v. National Labor Relations Board*, 70 F.3d 863, 872 (6th Cir. 1995) (an administrative law judge's opportunity to observe a witness's demeanor "does not, by itself, require deference with regard to his or her derivative inferences."); *Bishopp v. District of Columbia*, 788 F.2d 781, 785 (D.C. Cir. 1986) (although a trial judge's credibility determinations demand deference, an appeals court may nevertheless reject such determinations if they are without support in the record). In the present case, the Presiding Officer provided no support for the assertion that the assessed penalty would provide an adequate deterrent, nor can we find any support for this assertion in the record before us.

Treatment Company, Inc. and Cary W. Thigpen.[40] Respondents shall pay the full amount of the civil penalty within sixty (60) days of receipt of this final order, unless otherwise agreed by the parties. Payment shall be made by forwarding a cashier's check or certified check in the full amount payable to the Treasurer, United States of America at the following address:

EPA - Region IV
Regional Hearing Clerk
P.O. Box 100142
Atlanta, GA 30384

So ordered.

[40] Because the Board does not believe that oral argument would be of material assistance in resolving this matter, the Region's request for oral argument is denied.